Paper No. 14
HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 1/13/00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Horphag Research Limited

v.

Douglas G. Mann, assignee of Cape Cod Biolab Corporation, formerly Cape Cod Laboratory Corporation

Opposition No. 106,125
to application Serial No. 75/037,754
filed on December 8, 1995

Marvin S. Gittes of Cobrin & Gittes
for Horphag Research Limited.

Craig A. Fieschko of Dewitt Ross & Stevens S.C.
for Douglas G. Mann.

Before Seeherman, Walters and Wendel, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Cape Cod Laboratory Corporation[1] filed an application to register the mark CRANOGENOL (stylized) for "nutritional

[1] The original applicant's name, Cape Cod Laboratory Corporation, was changed to Cape Cod Biolab Corporation. This change of name was recorded by the Office at Reel 1803, Frame 0014. The application was then assigned to Douglas G. Mann, as an individual. The assignment, executed March 25, 1999, was recorded at Reel 1887, Frame 0036. The caption of this proceeding has thus been amended to reflect both the change of name and the assignment. We note, however, that inasmuch as the

supplements prepared with extracts of cranberries."[2]

Horphag Research Limited filed an opposition to registration of the mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act. Opposer alleges use of the mark PYCNOGENOL for dietary and nutritional supplements since as early as July 27, 1987; ownership of a registration for the mark;[3] and likelihood of confusion if applicant were to use its mark in association with nutritional supplements.

Applicant, in its answer, denied the salient allegations of the notice of opposition. Applicant has taken no action in the case since the filing of its answer other than appointing new counsel.

The record consists of the file of the involved application and the certified status and title copy of opposer's registration, the copy of the assignment documents recorded by the Office on February 2, 1993, showing that the

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present application was filed under Section 1(b) and no allegation of use has been filed, the application may only be assigned under Trademark Rule 3.16 to a successor to applicant's business or that portion of the business to which the mark pertains. Accordingly, in the event that applicant ultimately prevails in this proceeding, the application should be remanded to the Examining Attorney under Trademark Rule 2.131 for consideration of the effect of the assignment on the validity of the application.

[2] Serial No. 75/037,754, filed December 8, 1995, based on an assertion of a bona fide intention to use the mark in commerce.

[3] Registration No. 1,769,633, issued May 11, 1993, for the mark PYCNOGENOL for "dietary and nutritional supplements"; Section 8 affidavit filed and accepted.

present owner of the registration is opposer and not its predecessor-in-interest, Horphag Overseas Limited, as indicated on the certified copy of the registration, and the copy of a new recordation form cover sheet and request for correction of assignment which were filed with the Office on January 20, 1998, all of which were made of record by means of opposer's notice of reliance.[4] Opposer filed a brief, but an oral hearing was not requested.

Priority is not an issue here, in view of the certified status and title copy of the opposer's pleaded registration. King Candy Co. v. Eunice King's Kitchen, Inc. 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). The supplemental documents made of record establish the transfer of title to opposer, although not reflected in the certified copy of the registration, and the recordation of this assignment with the Office.[5]

Thus, we turn to the issue of likelihood of confusion, and to those of the du Pont factors which are relevant under the present circumstances.[6]

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[4] The exhibits attached to the brief are untimely filed and have been given no consideration.

[5] The correction of prior Office records and recordation of the assignment which was executed September 18, 1990 has been recorded by the Office at Reel 1684, Frame 0811.

[6] In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Insofar as the goods of the parties are concerned, the broad identification of opposer's goods in its registration as dietary and nutritional supplements encompasses the particular nutritional supplements of applicant. Opposer has attempted to make the relationship between the goods of the parties even more specific by its assertions that its supplements are made primarily from pine bark and thus the goods of both are manufactured from plant extracts. Opposer has made no evidence of record, however, to support this claim. Nonetheless, for purposes of determining likelihood of confusion, the goods of the parties must be considered to be identical.

Opposer states that its goods are sold by mail order, on the Internet and in retail stores. There being no limitation in the identification of goods in either applicant's application or opposer's registration, it must be presumed that both parties' goods would travel in all the normal channels of trade and be sold to all the usual purchasers for goods of this nature. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, we must assume that applicant's goods would be marketed through the same trade channels and to the same purchasers as opposer's goods.

The issue narrows down to whether the marks are of such a degree of similarity that confusion as to source is likely

when the same potential purchasers encounter opposer's PYCOGENOL nutritional supplements and applicant's CRANOGENOL nutritional supplements containing cranberry extracts. It is well recognized that in general the greater the similarity of the goods, the lesser the degree of similarity of the marks which is necessary to support a conclusion that there will be a likelihood of confusion. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Opposer argues that the marks PYCNOGENOL and CRANOGENOL must be considered in their entireties, and as such they are very similar, both having ten letters, four syllables, the same stress pattern with the primary accent on the second syllable, and the same suffix -NOGENOL.

Of these asserted similarities, we find the presence of the common suffix –NOGENOL to be the most significant. In the first place, this suffix represents a major portion of each mark. Furthermore, on the record before us, the suffix appears to be arbitrary when used with opposer's nutritional supplements. There is no evidence of use by others of a similar suffix for similar goods, as might indicate that -NOGENOL is suggestive of a characteristic or feature of the nutritional supplements. For purposes of our determination of likelihood of confusion, the suffix is common only to the marks of opposer and applicant. Cf. Tektronix, Inc. v.

Daktronics, Inc. 187 USPQ 588 (TTAB 1975), aff'd, 534 F.2d 915, 189 USPQ 693 (CCPA 1976)[third-party registrations show that others have adopted the suffixes -TRONICS or -TRONIX to suggest the electronic nature of their goods and thus the inclusion of these suffixes in the marks TEKTRONIX and DAKTRONICS is not sufficient in itself to predicate a holding of likelihood of confusion].

This being the case, we do not find the sole difference between the marks, the first syllable of each, sufficient to distinguish the marks as a whole. It is true that the beginning syllable of applicant's mark is suggestive of the composition of its supplements, whereas, on this record, the beginning syllable of opposer's mark PYCNOGENOL appears to be arbitrary.[7] Nonetheless, we believe that purchasers already familiar with opposer's PYCNOGENOL nutritional supplements might well assume that applicant's CRANOGENOL supplements are new products, or an expansion into a new type of supplement, originating from opposer. The difference in the first syllable would more likely be viewed as an indication of a separate product, rather than of a separate source. See NutraSweet Co. v. K & S Foods, Inc., 4 USPQ2d 1964 (TTAB 1987)[purchasers familiar with NUTRASWEET

[7] We take judicial notice of the dictionary definition of the prefix "pycno" as "a combining form meaning 'dense,' 'close,' or 'thick,' used in the formation of compound words." *Random House Unabridged Dictionary*, 2nd Ed. (1987).

sweetening product likely to assume that NUTRA SALT salt is a new product line put out by same producer].[8]

Accordingly, we find the marks PYCOGENOL and CRANOGENOL sufficiently similar, if both are used on nutritional supplements, to result in a likelihood of confusion.[9] To the extent that any doubt may exist, this doubt must also be resolved in opposer's favor, as the prior user of its mark for nutritional supplements and against applicant as the newcomer. See Century 21 Real Estate Corp. v. Century Life of America, *supra*; and Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

[8] We are aware that in a recent unpublished decision in Horphag Research Limited v. FreeLife International, LLC., Opposition No. 102,797 (TTAB Aug. 20, 1999), the Board dismissed the opposition filed by opposer, based on its same mark PYCNOGENOL, against registration of the mark SOYGENOL for nutritional supplements. We find the circumstances here to be distinguishable, in that the present marks are of an equal number of syllables and share three common syllables. As a whole, there is a much greater degree in similarity in the marks in the present case.

[9] Opposer has further argued that because of the medicinal properties of the nutritional supplements, the doctrine of greater care should be applied and a lesser degree of similarity of the marks required. Because we think that purchasers exercising ordinary care are likely to be confused, we find no need to consider of the applicability of that doctrine to the present goods.

Decision: The opposition is sustained and registration is refused to applicant.

E. J. Seeherman

C. E. Walters

H. R. Wendel
Trademark Administrative Judges,
Trademark Trial and Appeal Board